RAMES PALANIANDY v. MALAYAN BANKING BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
JOHN LEE KIEN HOW JC
[ORIGINATING SUMMONS NO: WA-24NCvC-480-03-2020]
23 MARCH 2022

Abstract – *(i) The action by the chargor challenging the validity of the order for sale obtained by the bank upon default in payment by the chargor is bound to fail; not only did the chargor fail to establish any 'cause to the contrary' but that the successful bidder, having satisfied all the requirements and having his name registered in the title of the property, had obtained an indefeasible title to the property; (ii) An undischarged bankrupt is incompetent to commence any proceedings in court without the prior sanction of the Director General of Insolvency, the rationale being to protect the interest of the creditors.*

LAND LAW: *Sale of land – Auction – Challenge against order for sale – Property auctioned by bank upon default in payments by chargors – Whether order for sale obtained in compliance with s. 263 of National Land Code ('NLC') – Whether bankrupt chargor obtained sanction of Director General of Insolvency before commencing proceedings – Whether 'cause to the contrary' under s. 256(3) of NLC shown – Whether registration of successful bidder's name in title formed conclusive evidence of proprietorship – Whether successful bidder a bona fide purchaser – Whether obtained indefeasible title*

The plaintiff and his mother ('borrowers') obtained a housing loan from the first defendant which was secured by a charge over the property. However, when the borrowers defaulted in the payment, the first defendant applied and obtained an order for sale ('OFS') of the property. The property was successfully bid by the second defendant. The plaintiff thus applied, *vide* encl. 1, amongst others, for: (i) a declaration that the OFS was void *ab initio* and had to be cancelled in accordance with the National Land Code ('NLC'); (ii) a declaration that there was a cause to the contrary that the first defendant had failed and/or omitted to take into consideration before obtaining the OFS; (iii) a declaration that the first defendant had failed to carry out its obligation to fulfil the agreement made to the plaintiff; (iv) an order that the first defendant had to indemnify and/or bear the loss on behalf of Etiqa Insurance whom had failed to grant to the plaintiff's mother, the third party chargor, who was handicapped, her rights and interest under the MRTA policy; (v) an order that the defendants pay exemplary damages to the plaintiff; and (vi) an order that the defendants pay compensation to the plaintiff. The first defendant submitted that the OFS was valid and in accordance with s. 263 of the NLC and argued that the plaintiff's application was defective on the grounds, *inter alia*, that the plaintiff had no *locus standi*

to bring this suit as he was a bankrupt and thus, should have obtained the sanction of the Director General of Insolvency ('DGI') pursuant to s. 38(1) of the Insolvency Act 1967 ('1967 Act') before bringing this suit. The second defendant's contention, amongst others, were that: (i) the second defendant was a *bona fide* purchaser who had acquired an indefeasible title over the property *vide* public auction; (ii) the registration of the second defendant's name as the proprietor of the property was the conclusive evidence to prove the ownership; (iii) the plaintiff and his mother had no caveatable interest on the property; (iv) the plaintiff was estopped from raising the issue of validity of the OFS since the issue had been ventilated and/or decided in the earlier suits; and (v) the plaintiff had failed to name the District Officer of Gombak Land Office and/or the Gombak Land Administrator ('GLA') as a party in this suit.

Held (dismissing encl. 1 with costs):

(1) The borrowers, being the chargors of the property, defaulted in making payments as prescribed by the housing loan terms. Thus, D1 commenced an action to auction the property. Upon application in Form 16G, the GLA has granted the OFS based on Form 16H filed by D1. There were a series of investigations held by the GLA, where the plaintiff was present in all of the investigations, except for the last one. Besides the plaintiff, the DGI was also present in all of these investigations as the administrator of the plaintiff's estate, who was and is still an undischarged bankrupt. The plaintiff had not filed any appeal to Form 16H issued by the GLA. Hence, the OFS was in order according to s. 263 of the NLC. There was nothing to suggest or support that the auction in favour of the second defendant was irregular, void or in any way against the NLC. (paras 25-27 & 30)

(2) There was only a bare assertion by the plaintiff that there was some 'agreement' between the first defendant's staff and the plaintiff, but nothing conclusive had been tendered. In the absence of any evidence, there was no 'cause to the contrary' as required under s. 256(3) of the NLC. Further, the registration of the second defendant's name in the title of the property was conclusive evidence that he was the proprietor of the property. Hence, in the absence of any 'cause to the contrary', and provided that he was a *bona fide* purchaser, he enjoyed the indefeasibility guaranteed by the *Torrens* system and the NLC, in particular, under s. 340 of the NLC. (paras 32 & 35)

(3) The burden was on the plaintiff to convince the court that the second defendant was not a '*bona fide* purchaser'. However, apart from alleging that the second defendant was not a *bona fide* purchaser, there were no other material facts adduced by the plaintiff to establish this allegation.

The second defendant had successfully bid and paid the auction price and was duly registered as the new proprietor of the property. Hence, the plaintiff's bare allegation was without any proof, was baseless and without merit. The plaintiff therefore, had failed to convince the court of his accusations against the second defendant. (para 38)

(4) The plaintiff had also failed to include the co-proprietor *cum* co-borrower *cum* co-chargor, his mother, as one of the parties in this suit. The plaintiff's argument that his mother was not named as a party because of her old-age and her incapacity, was flawed. The plaintiff should have, at least, obtained his co-chargor to affirm a simple affidavit indicating that she was supportive or had no objection to the filing of encl. 1. The absence of this further casted doubt as to his full capacity in the filing of encl. 1 and hence, the application was defective and ought to be struck out. (para 42)

(5) The plaintiff, as an undischarged bankrupt, must first obtain a sanction from the DGI before commencing the suit, pursuant to s. 38(1) of the 1967 Act. The prior sanction is a pre-requisite and the plaintiff had failed to obtain the same. Hence, the plaintiff had no *locus standi* to commence this suit which made encl. 1 invalid in the eyes of the law and hence, the action must be dismissed. (paras 44, 47 & 57)

(6) Under item 11 of the Schedule (Additional Powers of High Court) to the Courts of Judicature Act 1964, this court has the power to dismiss or stay any proceeding where the matter in question is barred by the doctrine of *res judicata*, or due to any reason of multiplicity of proceedings in any court or courts. The plaintiff was attempting to re-litigate the similar, if not identical, issues of facts, law or mixed facts or law which had already been determined and decided in the 2018 and 2019 suits pertaining to the nullity of the OFS. Thus, the filing of encl. 1 was estopped by the doctrine of *res judicata*. Further, the plaintiff, being aggrieved by the decision of the GLA, should have appealed within the time stipulated by the law. Likewise, if he was dissatisfied with the 2018 Suit or the 2019 Suit, he should have appealed against it. Having failed to do so, the plaintiff ought not to be allowed to relitigate in this proceeding through encl. 1 or be allowed to appeal from the 'back door'. (paras 49, 52 & 55)

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Chan Boi Loi v. Public Bank Bhd & Another Application [2009] 6 CLJ 81 FC ***(refd)***

Instant Bonus Development Sdn Bhd v. Wong Ching Yong & Anor; Malaysia Building Society Bhd (Intervener) [2021] 1 LNS 1353 HC ***(refd)***

J Raju v. Kwong Yik Bank Bhd & Anor [1994] 1 LNS 197 SC ***(refd)***

Lai King Lung & Anor v. Merais Sdn Bhd [2020] 9 CLJ 449 FC ***(refd)***

A *Loh Seng Lee v. Yunley Enterprise Sdn Bhd & Anor And Another Appeal [2009] 3 CLJ 486 CA* ***(refd)***
Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***
M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 14 SC ***(refd)***
Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam [2006] 4 CLJ 458 CA ***(refd)***
B *Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors And Other Appeals [2008] 6 CLJ 626 CA* ***(refd)***
Sangka Chuka & Ors v. Pentadbir Tanah Daerah Mersing Johor & Ors [2014] 1 LNS 734 HC ***(refd)***
Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***
Sim Kooi Soon v. Malaysia Airlines System (No 2) [2010] 9 CLJ 936 CA ***(refd)***
C *Tan Wee Hun v. Inchcape Equatron (M) Sdn Bhd [1998] 5 CLJ 769 HC* ***(refd)***
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***
Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal [2013] 9 CLJ 577 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, Schedule item 11
D Insolvency Act 1967, s. 38(1)(a)
Local Government Act 1976, ss. 146, 148, 151
National Land Code, ss. 89, 256, 263(3), 320, 340(2)(c), 418

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Reported by S Barathi

JUDGMENT

F **John Lee Kien How JC:**

Introduction

Facts Of The Case

[1] The plaintiff was one of the co-proprietors of a property held under
G H.S.(M) 29456 (formerly known as H.S.(M) 44) PT 4601, Mukim Rawang, Daerah Gombak, Negeri Selangor ("the property")) which was charged to the first defendant as a security for a housing loan granted. The other co-proprietor cum co-chargor was one Thaianairgee a/p Saminathan (NRIC No: 580320-10-5682) who is the plaintiff's mother.

H **[2]** The first defendant ("D1") is the financial institution which granted the housing loan to the plaintiff and his mother (collectively "the borrowers") and had been registered as the chargee of the property.

[3] The second defendant ("D2") who is also the intervener in this present suit, is the current proprietor and the successful bidder for the property under
I the proclamation of sale ("the POS").

[4] The borrowers were granted housing loan by D1. The housing loan was secured by a charge (No. Pers: 5301/2005) over the property ("the charge"). However, the borrowers later defaulted in the payment. As a result, D1 commenced legal action against the borrowers.

[5] D1 then applied for a foreclosure of the property to enforce its right under the charge. The application was made to the Gombak Land Administrator ("the GLA") for an order for sale ("OFS") of the property. The property was successfully bid by D2.

[6] The plaintiff now applies (without his co-proprietor cum co-chargor and co-borrower) before this court *vide* originating summon ("encl. 1"), amongst others, for:

(i) a declaration that the OFS dated 25 January 2018 for the property was void *ab initio* and has to be cancelled in accordance with the National Land Code ("the NLC");

(ii) a declaration that there was a cause to the contrary where D1 has failed and/or omitted to take into consideration before obtaining the OFS;

(iii) a declaration that D1 has failed to carry out its obligation to fulfil the agreement made to the plaintiff;

(iv) an order that D1 has to indemnify and/or bare the loss on behalf of Etiqa Insurance who has failed to grant to the plaintiff's mother, a third party chargor, who is a handicapped, her rights and interest under the MRTA policy;

(v) an order that the defendants to pay exemplary damages to the plaintiff; and

(vi) an order that the defendants to pay compensation to the plaintiff.

Plaintiff's Submission

[7] The plaintiff averred that the title obtained by D2 is a defeasible title. D2 is not a *bona fide* purchaser, according to the plaintiff. He referred to s. 340(2)(c) of the NLC and the case of *Chan Boi Loi v. Public Bank Bhd & Another Application* [2009] 6 CLJ 81 to support this contention.

[8] The plaintiff further alleged that there was an 'arrangement' between D1 and the plaintiff. The essence of the 'arrangement' was that D1 agreed to cancel the POS dated 26 October 2017 should the plaintiff paid the amount of RM1,000 per month to settle the arrears.

[9] The plaintiff later submitted that the parties' right and interest over the property is yet to be adjudicated by this court. He cited the case of *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 14.

[10] The plaintiff argued that there are several issues to be dealt with and to be disposed by this court, amongst other, the validity of the OFS since there was an arrangement and/or deal made between D1 and the plaintiff. The plaintiff relied on *J Raju v. Kwong Yik Bank Bhd & Anor* [1994] 1 LNS 197; [1994] 2 MLJ 408 as the authority on this.

D1's Submission

[11] D1 in its submission averred that the OFS dated 2 November 2015 issued by the GLA was valid and in accordance with s. 263 of the NLC. The OFS, according to D1, has only been granted after the GLA was satisfied with the investigations held and after assuring that there was no cause to the contrary pointed out by the plaintiff.

[12] D1 referred this court to s. 263 of the NLC and the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77 which highlighted three categories in which a case might be established as "cause to contrary" according to s. 263 of the NLC.

[13] D1 further argued that the plaintiff's encl. 1 is defective on numerous grounds, among others, that the plaintiff has no *locus standi* to bring this suit as he is a bankrupt. D1 further premised that the plaintiff has been declared a bankrupt since 10 September 2013 and thus he has to obtain a sanction from the Director General of Insolvency ("the DGI") before bringing this suit in this court. D1 referred this court to s. 38(1) of the Insolvency Act 1967 ("IA 1967") which mentioned about the duties and disabilities of a bankrupt. D1 further referred to the case of *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* [2006] 4 CLJ 458; [2006] 6 MLJ 511 as authority. D1 further highlighted to this court that the plaintiff has neither denied that he was a bankrupt, nor did he showed any proof that he has been discharged from being one in any of the affidavits filed.

D2's Submission

[14] D2 begun his submission by pointing out that the plaintiff has failed to obtain sanction from the DGI before bringing this suit. Apart from relying on s. 38(1) of the IA 1967, D2 also referred this court to the case of *Lai King Lung & Anor v. Merais Sdn Bhd* [2020] 9 CLJ 449 and *Tan Wee Hun v. Inchcape Equatron (M) Sdn Bhd* [1998] 5 CLJ 769 as authorities to support this contention.

[15] D2 further stressed that D2 is a *bona fide* purchaser who has acquired an indefeasible title over the property *vide* public auction, pursuant to s. 320 of the NLC. D2 relied on the case of *Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors And Other Appeals* [2008] 6 CLJ 626; [2008] 6 MLJ 672.

[16] D2 also asserted that the registration of D2's name as the proprietor of the property is the conclusive evidence to prove the ownership. D2 referred to s. 89 of the NLC and the Court of Appeal's case of *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* [2013] 9 CLJ 577 to support this contention.

[17] D2 further premised that the plaintiff and his mother have no caveatable interest on the property. This claim is based on the order granted by the Kuala Lumpur High Court in Suit No. WA-24NCvC-2431-11-2018 ("2018 suit") and WA-24NCvC-2018-09-2019 ("2019 suit"). In these two suits, the court has granted an order to remove the private caveat entered by the plaintiff and his mother, as they have no caveatable interest over the property.

[18] Apparently, there was no appeal lodged by the plaintiff against these decisions. Hence, D2 argued that the plaintiff has accepted the correctness of the two Kuala Lumpur High Court's decisions. D2 referred this court to the case of *Syed Omar Syed Mohamed v Perbadanan Nasional Bhd* [2012] 9 CLJ 557.

[19] According to D2, the plaintiff is now estopped to raise the issue of validity of the OFS since the issue has been ventilated and/or decided in both the 2018 suit and 2019 suit. They referred this court to the case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 and *Sim Kooi Soon v. Malaysia Airlines System (No 2)* [2010] 9 CLJ 936. Thus, the plaintiff's application to challenge the validity of the OFS is an abuse of court process.

[20] Furthermore, D2 contended that, the plaintiff has failed to name the District Officer of Gombak Land Office and/or the GLA as the party in this suit. It is trite law, according to D2, that the said OFS was the "decision" made by the GLA within the ambit of s. 418 of the NLC. Thus, the plaintiff should have appealed to the GLA instead to this court, if he is aggrieved by the auction held. D2 cited the cases of *Loh Seng Lee v. Yunley Enterprise Sdn Bhd & Anor And Another Appeal* [2009] 3 CLJ 486; [2009] 2 MLJ 242 and *Sangka Chuka & Ors v. Pentadbir Tanah Daerah Mersing Johor & Ors* [2014] 1 LNS 734; [2014] MLJU 696 as authorities.

Findings And Decisions Of The Court

[21] After appraised the facts adduced by the parties through affidavits, exhibits and the submissions by learned counsels for all parties, I dismiss encl. 1 with costs. Herein are my reasons.

The Auction And The Title Of The Property

[22] The plaintiff has alleged that the OFS dated 25 January 2018 was void *ab initio* and that there was something 'cause to contrary'. Also, he has accused that D2 was and is not a *bona fide* purchaser and thus could not obtained any good title to the property. I shall discuss all these arguments under this heading.

(a) The OFS Was In Accordance With Section 263 Of The NLC

[23] The plaintiff seeks for, according to encl. 1, a declaration that the OFS dated 25 January 2018 is *void ab initio* and need to be cancelled by this court. The plaintiff further applies to this court to declare that there was a 'cause to contrary' where D1 has failed and/or omitted to take into consideration before obtaining the OFS of the property.

[24] I shall now discuss the substance of the plaintiff's claim under prayers 1 and 2 pertaining to the nullity of the OFS. It is trite law that s. 263 of the NLC governs the law for order for sale. For the ease of reference, the relevant provisions in s. 263 of the NLC is reproduced here:

> 263. Order for sale, and matters to be dealt with thereby
>
> (1) At the conclusion of any enquiry under section 261, the Land Administrator shall order the sale of the land or lease to which the charge in question relates **unless he is satisfied of the existence of cause to the contrary**.
>
> (2) Every such order shall be in Form 16H, and shall
>
> (a) provide for the sale to be by public auction;
>
> (b) Specify the date on which the sale is to be held, being a date not less than one month after the date on which the order is made;
>
> (c) specify the amount due to the charge at the date on which the order is made;
>
> (d) fix a reserve price for the purpose of the sale, being a price equal to the market value of the land or lease in question as estimated by the Land Administrator;
>
> (e) specify that no bidder shall be allowed to bid in the sale unless the Land Administrator is satisfied that the bidder possesses, at the time of the sale, the sum equivalent to ten per centum of the reserve price specified under paragraph (d);
>
> (f) specify that where the full amount of the purchase price is not paid after fall of the hammer by the successful bidder, the sum specified in paragraph € shall be paid to the charge and forthwith credited into the account of the chargor pending the settlement of the balance of the purchase price;

(g) specify that the balance of the purchase price shall be settled on any date not later than one hundred and twenty days from the date of sale and there shall be no extension of the period so specified; and

(h) specify that where the balance of the purchase price is not settled on a date specified under paragraph (g), the sum paid as deposit under the paragraph (f) to the charge shall be forfeited and disposed of in manner specified under section 267A.

(emphasis added)

[25] According to the affidavit filed by D1, the borrowers, being the chargors of the property, has default in making payments as prescribed by the housing loan terms. Thus, D1 commenced an action to auction the property. Upon application in Form 16G, the GLA has granted the OFS dated 2 November 2015. This was based on Form 16H dated 2 November 2015 which was filed by D1.

[26] There were series of investigations held by the GLA, in which the plaintiff was present in all of the investigations, except for the last one, held on 27 October 2015. D1 also pointed out to this court that in all of these investigations, the DGI was present as the administrator of the plaintiff's estate, who was and is still an undischarged bankrupt.

[27] The plaintiff has not filed any appeal to Form 16H issued by the GLA. After satisfied that there was no cause to the contrary, the GLA then held the first auction dated 23 December 2015. However, the successful bidder failed to settle the balance of the reserve purchase price within the time stipulated by the NLC.

[28] The second auction was held on 25 January 2018 with a reserve price of RM198,000 and D2 was the successful bidder for the property. This was based on the contract of sale dated 25 January 2018 and Form 16Q dated 1 June 2018, which was filed as an exhibit in D1's affidavit opposing encl. 1.

[29] The surplus of the auction price has been paid to the DGI as the administrator of the estate of the plaintiff. D1 supported this assertion by referring to Form 16I – Acknowledgment of Sale issued by the GLA, which was tendered as another exhibit in D1 's affidavit to this court.

[30] Thus, it is clear to this court that the OFS held was in order according to s. 263 of the NLC, based on all of the exhibits filed by D1. There is nothing to suggest or support that the auction in favour of D2 was irregular, void or in any way against the NLC, as alleged by the plaintiff.

(b) Cause To Contrary

[31] In his application, the plaintiff has also sought for a declaration that there is "cause to contrary" to the OFS so granted. In the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* (*supra*), Gopal Sri Ram JCA (at pp. 44 to 46) (CLJ); pp. 82 to 84, para F-I, A-I, and A-B (MLJ)) has succinctly explained "cause to contrary":

> In our judgment, "cause to the contrary" within s. 256(3) may be established only in three categories of cases.
>
> *First, it may be taken as settled that a chargor who is able to bring his case within any of the exception of the indefeasibility doctrine housed in s. 340 of the Code establishes cause to the contrary* ...
>
> *Secondly, a chargor may show cause to the contrary within s. 256(3)of the Code by demonstrating that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale*. For example, failure on the part of the chargor to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute a cause to the contrary. So too, where the notice demands sum not lawfully due from the charge. See *Cooperative Central Bank Ltd v. Meng Kuang Properties Bhd* [1991] 2 MLJ 283. However, in such a case, it would be open to the charge to subsequently serve a notice or a proper notice (as the case may be) before commencing proceedings afresh as the cause to the contrary does not in substance affect the chargee's right to apply for an order for sale.
>
> *Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity*. This principle finds its origin in the judgment of Aitken J in *Murugappa Chettiar v. Letchumanan Chattier* [1939] MLJ 296 at p. 298 where he said:
>
> > I agree that equitable principles should not be invoked too freely for the purpose of construing our Land Code, but surely chargor, who shows that there would be no need to sell his land if the charge paid up in full what is due from himself in another capacity, has shown good and sufficient cause why the land should be sold. Section 149 of the Land Code obviously contemplates that there may be cases which charged land should not be sold, even though there has been a default in payment of the principal sum or interest thereon secured by the charge; and it seems to me that the chargor may 'shew cause' either in law or equity against an application for an order for sale, that the courts should refuse to make an order in every case where it would be unjust to do so. By 'unjust' I mean contrary to those rules of the common law and equity which are enforce in the Federated Malaya States.
>
> (emphasis added)

[32] Likewise in our present suit, from the facts adduced by the parties there was nothing "cause to the contrary" as required under s. 256 of the NLC. The facts do not fit in any of the categories stated above. The only fact put forward by the plaintiff is a bare assertion that there was some 'agreement' between D1's staff and the plaintiff. However, nothing conclusive has been tendered to prove to this court. Upon query by this court, the plaintiff's counsel, during his oral submission, averred that they would tender this evidence on appeal through an application to adduce fresh evidence. Since the same has never been adduced before me, it is clear that, the case, as it is before me, is nothing "cause to contrary" under s. 256(3) of the NLC.

(c) Conclusiveness of Register Documents of Title

[33] It is trite law that a register document of title is conclusive evidence of the ownership which confers an indefeasibility title or interest to the registered proprietor that defeats all unregistered claims. This is by virtue of s. 89 of the NLC which says:

> 89. Conclusiveness of register documents of title
>
> Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence:
>
> (a) that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and
>
> (b) of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same required by any provision of this Act to be specified or referred to in that document.

[34] The same principle has been highlighted in the Court of Appeal's case of *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* (*supra*) where Raus Sharif PCA (as His Lordship then was) at p. 595 held that:

> [40] In view of the clarity of the words employed in the abovementioned provisions, there is just no two ways about the interpretation to be given to this section. It is patently clear that since **the register document of title is conclusive evidence of ownership** and in the present instance since the registered document of titles bears the name of the fourth defendant as the registered proprietor, hence it follows and becomes conclusive evidence that the fourth defendant is the registered proprietor for the time being.
>
> (emphasis added)

[35] In the similar vein, in our present suit the fact that D2's name is registered in the title of the property, is conclusive evidence that he is the proprietor of the property. In the absent of anything "cause to contrary", and provided that he is a *bona fide* purchaser (to be discussed in the next sub-section), he enjoys the indefeasibility guaranteed by the *Torrens* system and the NLC, in particular, s. 340 of the NLC.

(d) *Bona Fide* Purchaser

[36] I shall now move to the next point argued by the plaintiff that D2 was not a *bona fide* purchaser and thus the title obtained was a defeasible one.

[37] A good answer to this contention can be found in the decision of the Court of Appeal in *Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors And Other Appeals* (*supra*). In this case the appellant was one of the eight co-proprietors of a parcel of land, which was sold at a public auction pursuant to ss. 146, 148 and 151 of the Local Government Act 1976 by the respondent for the failure to pay assessment rate. The land was sold to the third respondent/intervener who had charged it to the second respondent. The appellant then challenged the OFS as being nullity since the originating summons was not served on her. Richard Malanjum JCA (as he then was) held at p. 684:

> [42] Thus, being a purchaser in good faith and for valuable consideration having paid within the stipulated time the balance of the purchase price arising from the public auction sale, the second intervener had acquired an indefeasible title or interest to the said land upon being registered as the registered proprietor.

[38] In our present case, the plaintiff has alleged that D2 was not a *bona fide* purchaser. However no material facts have been adduced to establish this allegation. D2 has successfully bid and paid the auction price to GLA thereafter. In view of that, he was duly registered as the new proprietor of the property. When the plaintiff disputes this and accuses him as someone who is not a '*bona fide* purchaser', the burden is on the plaintiff to convince the court. The plaintiff has not forwarded anything to suggest so. Such bare allegation is thus without any proof, is baseless and is without merit. Again, the plaintiff has failed to convince this court his accusation.

Other Aspects Of Enclosure 1

[39] Besides, the plaintiff's application in encl. 1 is full of other issues and lacks. For the completeness of discussion, I shall discuss these lacks separately here.

(a) The Plaintiff's Application Is Defective

[40] D1 pointed out to this court that there was never any 'OFS dated 25 January 2018' as mentioned in encl. 1. The only OFS involving both the plaintiff and D1 is the one dated on 2 November 2015. This is based on the OFS – Form 16H dated 2 November 2015 in D1's affidavit.

[41] D1 contended before this court that the plaintiff might have confused the OFS with the POS dated on 25 January 2018. This confusion has caused this application to be defective because the heart of the entire application in encl. 1 is the alleged 'OFS dated 25 January 2018'. Regrettably, the

plaintiff's counsel has insisted that he was right and refused to ask for any oral amendment during the course of oral submission. As such, the defect was uncured. Since there is no OFS dated 25 January 2018, the entire application is defective and ought to be struck out on that alone.

[42] Besides, the plaintiff also failed to include his co-proprietor cum co-borrower cum co-chargor, who is the plaintiff's mother, as one of the parties in this suit. Evidentially the affidavits filed by D1 contained sufficient relevant references to this court to confirm that there was indeed a co-proprietor and co-chargor in this case. The same is also shown in the then title deed exhibited by the plaintiff himself in his affidavit. During oral submission, upon such query by this court, the plaintiff's counsel admitted that the plaintiff's mother was indeed the co-proprietor and co-chargor. However, the plaintiff counsel's premised further that the mother was not named as a party in encl. 1 because of her old-age and her incapacity. With respect, this argument is flawed. Thus the court is of the view that this application is indeed a defective one. To the very least, the plaintiff should have obtained his co-chargor to affirm a simple affidavit indicating she is supportive or has no objection to the filing of encl. 1. The absent of this would further cast doubt as to his full capacity in filing encl. 1. In encl. 1, he is seeking declarations for the entire piece of land (jointly owned by both his co-chargor and himself). In fact in prayer 5, he is even seeking declaration so that his co-chargor would be indemnified. Without anything to confirm the stance of the co-chargor on all these, his *locus standi* and cause of action in encl. 1 is questionable. His attempt to seek such declarations here is again defective and ought to be struck out.

(b) Plaintiff Is An Undischarged Bankrupt

[43] It is an undeniable fact that the plaintiff in this suit is a bankrupt. The plaintiff has not denied this fact in any of the affidavits. In fact, during the submission, the plaintiff's counsel did not object to D1's and D2's contention that the plaintiff is an adjudicated and undischarged bankrupt.

[44] Pursuant to s. 38(1) of the IA 1967, being a bankrupt means the plaintiff must first obtain a sanction from the DGI before commencing any suit in this court. For the ease reference, the relevant provision in s. 38(1) of the IA 1967 is reproduced below:

Section 38(1)(a) Insolvency Act 1967

Duties and disabilities bankrupt.

(1) Where a bankrupt has not obtained his discharge:

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

(emphasis added)

[45] It is clear to us that a bankrupt is incompetent to bring any action unless prior to the action, he has obtained sanction from the DGI. I am guided by the decision made in the case of *Priyakumary Muthucumaru & Anor v. Gunasingam Ramasingam* (*supra*), in which Zulkifli JCA held that (at p. 467 (CLJ); p. 518 (MLJ)):

> [9] We are of the view the sanction that is required under s. 38(1)(a) of the Act is a written sanction from the Official Assignee. There must be first shown by the respondent in this case a formal application in writing mode by him as a bankrupt to the Official Assignee. The respondent has failed to do so here. The provision of **s. 38(1)(a) of the Act reproduced above is clear that a bankrupt shall be incompetent to maintain an action without the previous sanction of the Official Assignee**. The exception is only as regards an action for damages in respect of an injury to his person which is not the case here (see the case of *M/S Laksamana Realty Sdn Bhd v. Goh Eng Hwa* [2004] 3 MLJ 97). It is therefore our judgment that the learned judge of the High Court had erred in law when he took the view that s. 38(1)(a) of the Act does not apply to the facts of the case. We are also of the view that the learned judge had erred when he held that the presence of the officer from the office of Official Assignee in court in the proceedings before him on 7 July 2004 showed 'implied consent' for the respondent to maintain the action and to continue with the case. On this ground alone, the appellants would succeed and we would allow this appeal.
>
> (emphasis added)

[46] I further referred to the Federal Court case of *Lai King Lung & Anor v. Merais Sdn Bhd* (*supra*) where Vernon Ong Lam Kiat FCJ outlined the following (at p. 457):

> Principles Underlying the Requirement For Sanction
>
> [17] **In the case of undischarged bankrupt, the sanction of the Director General of Insolvency (DGI) is required in order for the bankrupt to maintain any action or proceeding** (other than an action for damages in personal injury claims) – **s. 38(1) of the Insolvency Act 1967**. This rule restricting the conduct of the undischarged bankrupt is meant for the protection of his creditor's interest and those dealing with him so as to maintain the commercial morality of hid dealings. The underlying rationale for a bankrupt's disabilities and disqualifications was expressed in the following manner in *Khoo's Law and Practice of Bankruptcy in Malaysia*, 2nd edn. At p. 1:
>
> > When a person becomes a bankrupt, he obtains protection from legal proceedings by his creditors subject to certain exceptions.
> >
> > However, he is subject to certain disabilities and disqualifications primarily aimed at preventing him from incurring further debts ...
> >
> > The objective of the bankruptcy process is that, since the debtor is unable to satisfy all his debts, his assets should be shared fairly and equitably among his creditors.

[18] In *Tan Wee Hun v. Inchape Equatron (M) Sdn Bhd* [1998] 5 CLJ 769, the court observed that:

> The objective of the Bankruptcy Act is to protect the public from irresponsible businessmen who transact business when they know they do not have the financial capacity to meet their payment obligation.

[19] *More importantly, the underlying principle for the requirement of a sanction is that if a bankrupt is allowed to continue with an action, he would not be able to pay costs should his action be dismissed. This would leave the defendant in a disadvantaged position; in that the defendant being compelled to defend the claim will be unable to recover costs if the bankrupt's claim is dismissed.*

(emphasis added)

[47] Therefore, it is again clear that encl. 1 is not valid in the eyes of law due to the lack of prior sanction from the DGI. This prior sanction is a pre-requisite for the plaintiff in our present case who is an undischarged bankrupt to commence this action. He has failed to do or obtain the same. Thus, this action must be dismissed.

(c) *Res Judicata*

[48] D2 contended that the plaintiff is barred from bringing this suit by the doctrine of *res judicata*. This is because the issue on validity of the OFS has been adjudicated by both the 2018 and 2019 suits.

[49] It is trite law that this court has the power to dismiss or stay any proceeding where the matter in question is barred by the doctrine of *res judicata*, or due to any reason of multiplicity of proceedings in any court or courts. The proceeding, in such situation, ought not to be continued as provided under item 11 of the Schedule (Additional Powers of High Court) to the Courts of Judicature Act 1964.

[50] In the landmark case of *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* (*supra*), the Federal Court explained (at p. 791, para. c-e) as follow:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. **When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more** the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari proeadem* cause. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

(emphasis added)

[51] Indeed the decision of the Court of Appeal in an earlier case of *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553; [2000] 1 MLJ 479 is of direct relevance to us. In that case, the appellant filed an application to set aside a default judgment for the second time on the basis that the default judgment ought never to have been entered in view of the agreement between the parties. The appellant had previously applied the same application for a different ground from that relied upon in this case. However, it was dismissed by the court. The Court of Appeal applied the wider sense of the doctrine of *res judicata* and held that the ground raised by the appellant belonged to the first application, but it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. As held by the Court of Appeal (at p. 492D):

> Applying the foregoing principle to the facts of the present case, it was certainly open to the appellant to ground its first application on the basis that the default judgment was irregular for the reasons we have set out earlier in this judgment. It was therefore an issue which properly belonged to the first application. **But it chose not to rely upon that ground. Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground**. It would, as Haidar HCA observed during the course of En Zainur's argument, amount to presenting one's case in instalments. That is something the law does not permit.
>
> (emphasis added)

[52] Clearly, the plaintiff in the present suit is attempting to re-litigate the similar, if not identical, issues of facts, law or mixed facts or law which had already been determined and decided in the 2018 and 2019 suits pertaining to the nullity of the OFS. The issues in our present case are all issues properly belonged to the OFS in 2018, and the 2018 and 2019 suites. However the plaintiff chose not to reply upon these grounds. The 2018 and 2019 suits were dismissed. It is not open to the plaintiff to make a second application to set aside the OFS on a different ground. Thus the filing of encl. 1 is estopped by the doctrine of *res judicata*.

[53] Reference should also be made to s. 418 of the NLC. For the ease of reference, the relevant provision of s. 418 of the NLC is reproduced here:

> **418. Appeals to the Court**
>
> (1) Any person or body aggrieved by any decision under this Act or State Director, the Registrar or any Land Administrator may, at any time **within the period of three months beginning with the date on which it was communicated to him**, appeal therefrom to the court.
>
> (2) Any such appeal shall be made in accordance with any written law for the time being in force relating to civil procedure; and the court shall make such order thereon as it considers just;

(3) In this section, "decision" includes any act, omission, refusal, direction or order.

(emphasis added)

[54] In the Court of Appeal's case of *Loh Seng Lee v. Yunley Enterprise Sdn Bhd & Anor And Another Appeal* (*supra*), Suriyadi CJA held that at p. 493 (CLJ); p. 247 (MLJ):

[10] As stated above we had allowed the appeal. We were of the view that a decision or direction by the land administrator to auction two pieces of land together was a 'decision' within the definition of s. 418(3) of NLC. On the proper reading of s. 418(1) of NLC, the correct course of action for the respondent to take was to file an appeal, which it had failed to undertake, instead of taking circuitous route (*Land Executive Committee of Federal Territory v. Syarikat Harper Gilfillan Berhad* [1980] 1 LNS 150)

[55] In this present suit, the plaintiff, being aggrieved by the decision of the GLA, should have made an appeal within the time stipulated by the law and not remained silent for more than three years before commencing this action. The investigation held by the GLA before granting the OFS was somewhere in 2015. The plaintiff should have appeal to the High Court within the three months period and not waited for too long as it will definitely prejudice the right and interest of the successful bidder, namely in this case, D2. Likewise, if he is unsatisfied with the 2018 suit or the 2019 suit, he must file his appeals therefrom and ventilate and vindicate the same in the appellate courts. He has failed to do so in both of these suits. He should not be allowed to relitigate this now in this proceeding through encl. 1 or be allowed to appeal from the 'back door'.

[56] In *Instant Bonus Development Sdn Bhd v. Wong Ching Yong & Anor; Malaysia Building Society Bhd (Intervener)* [2021] 1 LNS 1353; [2021] MLJU 1644; [2021] AMEJ 1362, Johan Lee JC stated the following:

[64] Therefore, it is obvious that the plaintiff now is attempting to re-litigate the issues which had been litigated and disposed by the courts in the previous suits. The only different is that in this suit, the plaintiff would like to expressly allege that there is a conspiracy among the parties. *Bearing in mind all the parties and facts are the same in all these suits and that all the material facts are the same throughout, the adding of this conclusion in the finale to try the second bites of the cherry is but an abuse of court process*. While the plaintiff conveniently said that they had never raised the issue of conspiracy previously, as stated in *Yat Tung Investment Co Ltd* case (*supra*) and our *Kluang Wood* (*supra*) case and many other authorities cited above including *Tenaga Nasional* (*supra*) case, *it would be an abuse of the process of the court to allow the plaintiff to bring a new proceeding in respect of the same issue which should have been litigated earlier. Besides, the court will not permit or condone the same party to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in dispute, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plaintiff should naturally bring this up in the previous*

A *cases. They did not*. After numerous failed attempts to relitigate the same facts and causes of action against the same parties, they now try to change part of the packaging and attempt to bring a new case. *This practice of presenting one's case by instalments is an obvious case of abusing the court's process. It should not be permitted nor condoned*.

(emphasis added)

B

Conclusions

[57] The plaintiff has no *locus standi* to commence this suit as he is an undischarged bankrupt and prior sanction has not been obtained from the DGI for him to file encl. 1. His application in encl. 1 is also tainted with C numerous defects and is also estopped by the doctrine of *res judicata*. He has failed to establish anything "cause to contrary" or that D2 is not a *bona fide* purchaser.

[58] To sum up, encl. 1 is a failed venture on all counts. Hence, this court find that encl. 1 has no merits and is hereby dismissed with costs.

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